Konsortium Lord-Saberkat Sdn Bhd v Petron Malaysia Refining & Marketing Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCVC)(W)-1237–08 OF 2015 AND W-02(NCVC)(W)-1208–07 OF 2015
ROHANA YUSUF, PRASAD ABRAHAM AND MARY LIM JJCA
27 JULY 2016

Contract — Agreement — Terms — Parties entered into standard transportation agreement — Transport provider to provide transportation services to deliver oil company's bulk fuels and petroleum products from tributary zones or loading plants to various locations — Expiry of agreement by effluxion of time — Invoices for various works and tasks completed issued — Invoices disputed — Claim for sums due

The plaintiff was a company in the business of, inter alia, providing transportation services while the defendant was a company in the business of, inter alia, operating oil refineries to process petroleum and petroleum products. The parties entered into a standard transportation agreement ('the agreement'). Under the agreement, the plaintiff agreed to provide transportation services to deliver the defendant's bulk fuels and petroleum products from the defendant's four tributary zones or loading plants to various locations in Peninsula Malaysia upon the request of order of the defendant. These zones or plants were the Port Dickson Terminal ('PDT'), Pasir Gudang Terminal ('PGT'), Bagan Luar Terminal ('BLT') and Kuantan Terminal ('KT'). The agreement was originally for the period commencing 1 January 2006–30 June 2011. However, the term of the agreement was extended to 30 November 2013, after which the agreement expired by effluxion of time. San Miguel Corp of the Philippines acquired substantial shares in the defendant, then known as 'Esso Malaysia Bhd'. Esso Malaysia Bhd was later known as 'Petron Malaysia Refining & Marketing Bhd'. Following this change, the plaintiff raised 13 invoices totaling RM41,091,723.50. Six of the invoices for the sum of RM26,745,277 were for purported shortfall in payment for services rendered in its listing of services through the self-billing system that the parties had implemented between themselves. The remaining seven invoices were for various works and tasks completed by the plaintiff which it claimed were upon the directions of the defendant. These seven invoices totaled a sum of RM14,346,446.50. All 13 invoices were disputed by the defendant. In its claim, the plaintiff sought first an order that the defendant rectify the listing of services and monthly SBS invoices amount including the months referred in the pertinent invoices; before claiming the total sum of RM41,091,723.50 together with interest

thereon. The High Court dismissed the plaintiff's prayer for rectification but allowed some of its claims totaling RM3,739,463 together with interest. Hence, these appeals. The defendant appealed against the whole of this decision while the plaintiff appealed in respect of those claims and invoices that were dismissed.

Held, dismissing the plaintiff's appeal and allowing the defendant's appeal in part:

(1) The burden of proof was on the plaintiff, not just in relation to the claim but in its assertion that there were errors in the self-billing system. Based on the payment mechanism in the agreement itself, the parties had provided that the SBS was assumed or treated as correct until and unless it was challenged within a 30 day time frame. Where there was proper documentation and information to support that challenge, the defendant was obliged to make corrections. The obligation was on the plaintiff to make the challenge within that agreed time frame. Where it made the challenge, it must provide proof of erroneous listing of services. The learned High Court judge was therefore correct when she determined that the legal burden was with the plaintiff (see para 20).

(2) Upon a careful reading of the agreement and in particular, cll 3.2 and 3.3, there were no terms including the ones under scrutiny to be unclear or ambiguous, certainly not as to warrant the engagement of the contra proferentum rule. The parties had agreed that payment was based upon a self-billing system. This SBS system meant payment relied on documentation in the form of PPRs generated by the defendant. The parties had given themselves a time frame for payment and for any eventual corrections. That time frame of 30 days allowed for disputes and corrections which if supported by documentation, would eventually be carried out. That must mean that if there were no disputes within that same time frame, then payment was automatic and electronically done. This interpretation gave all the terms and conditions of the agreement purpose and effect, especially when read together. Otherwise, cl 3.2 would serve no purpose and have no effect (see para 21).

(3) The High Court judge made specific findings of the plaintiff's failure to comply with cl 3.3 when it did not 'at the material time ... subsequently send defendant an invoice accompanied by supporting documentation and information'. All these specific findings of fact were borne out by the documentary and oral evidence before the trial judge and this court could not and did not find any reason to disturb such conclusions. The reading and application of the law to the facts here was with proper basis and it would be erroneous to intervene. When the burden of proof was not

discharged, it was neither appropriate nor proper to consider even the issue of relief, including moulding one to suit the peculiar facts and circumstances (see paras 22 & 27).

(4) The purchase order formed a separate contract which the parties were entitled to make at any time, even during the course of the agreement. Although there were no provisions for such services in the agreement, the services were agreed through a separate agreement. This was sufficient basis for this item of claim. The decision of the learned High Court judge on the de-branding was consequently affirmed (see para 32).

(5) As for the ten additional term trucks, the plaintiff's claim was for the costs of making available ten additional trucks which were already in the defendant's system as 'spot trucks'. 'Term trucks' referred to dedicated trucks meant only for the defendant's use and were already at the defendant's disposal. These trucks could not be used for any other purpose as they already carried the defendant's logo. 'Spot trucks' were trucks taken by the plaintiff from its pool of trucks for any of the company's temporary use. There were no appealable errors committed by the learned High Court judge on this head of claim and accordingly, this finding was not disturbed. The decision of the learned High Court judge on the additional term trucks was affirmed (see para 38).

(6) Given that the learned High Court judge was actually satisfied with proof of the various losses sustained by the defendant but disallowed the claim only for want of notice or invoice, the plaintiff's claim for a refund here ought to have been dismissed. There was indeed satisfactory evidence of the defendant's losses to its petroleum products caused by the plaintiff in the various incidents that had taken place (see para 55).

[Bahasa Malaysia summary

Plaintif adalah syarikat dalam perniagaan, antara lain, menyediakan perkhidmatan pengangkutan manakala defendan adalah syarikat dalam perniagaan, antara lain, menjalankan kilang penapis minyak untuk memproses petroleum dan hasil petroleum. Pihak-pihak telah memasuki perjanjian pengangkutan standard ('perjanjian'). Di bawah perjanjian itu, plaintif telah bersetuju untuk menyediakan perkhidmatan pengangkutan untuk menghantar bahan api pukal dan produk petroleum daripada empat cabang zon atau loji muatan kepada pelbagai lokasi di Semenanjung Malaysia atas permintaan pesanan defendan. Zon atau loji tersebut adalah Terminal Port Dickson ('TPD'), Terminal Pasir Gudang ('TPG'), Terminal Bagan Luar ('TBL') dan Terminal Kuantan ('TK'). Perjanjian pada mulanya adalah untuk tempoh bermula 1 Januari 2006–30 Jun 2011. Walau bagaimanapun, terma perjanjian dilanjutkan kepada 30 November 2013, selepas mana perjanjian itu tamat melalui peluputan masa. San Miguel Corp di Filipina telah memperoleh sebahagian besar saham dalam defendan, pada masa itu dikenali sebagai 'Esso

Malaysia Bhd'. Esso Malaysia Bhd kemudian dikenali sebagai 'Petron Malaysia Refining & Marketing Bhd'. Berikutan pertukaran ini, plaintif telah mengeluarkan 13 invois berjumlah RM41,091,723.50. Enam daripada invois berjumlah RM26,745,277 adalah bagi kekurangan dikatakan dalam pembayaran bagi perkhidmatan yang diberikan dalam senarai perkhidmatannya melalui sistem bil kediri ('SBK') yang telah dilaksanakan oleh pihak-pihak antara mereka sendiri. Baki tujuh invois untuk pelbagai kerja dan tugas yang telah disiapkan oleh plaintif yang dituntut olehnya adalah atas arahan defendan. Ketujuh-tujuh invois tersebut berjumlah RM14,346,446.50. Kesemua 13 invois tersebut telah dipertikaikan oleh defendan. Dalam tuntutannya, plaintif memohon pertama satu perintah agar defendan memperbetulkan senarai perkhidmatan dan jumlah invois bulanan SBK termasuk bulan-bulan yang dirujuk dalam invois-invois berkaitan; sebelum menuntut jumlah keseluruhan RM41,091,723.50 bersama faedah. Mahkamah Tinggi telah menolak permohonan plaintif untuk pembetulan tetapi membenarkan beberapa daripada tuntutannya berjumlah RM3,739,463 bersama faedah. Justeru, rayuan-rayuan ini. Defendan telah merayu terhadap keseluruhan keputusan ini manakala plaintif merayu berkaitan tuntutan-tuntutan dan invois-invois tersebut yang telah ditolak.

Diputuskan, menolak rayuan plaintif dan membenarkan sebahagian daripada rayuan defendan:

(1) Beban bukti terletak pada plaintif, bukan sahaja berkaitan tuntutan tetapi dalam penegasannya bahawa terdapat kesilapan dalam sistem bil sendiri. Berdasarkan mekanisme bayaran dalam perjanjian tersebut, pihak-pihak telah menyatakan bahawa SBK dianggap atau diandaikan sebagai betul sehingga dan kecuali ia dicabar dalam tempoh masa 30 hari. Di mana terdapat pendokumentasian dan maklumat untuk meyokong cabaran itu, defendan bertanggungjawab untuk membuat pembetulan. Tanggungjawab terletak pada plaintif untuk membuat cabaran itu dalam tempoh masa yang dipersetujui. Di mana ia membuat cabaran itu, ia perlu memberikan bukti kesilapan senarai perkhidmatan. Hakim Mahkamah Tinggi yang bijaksana dengan itu adalah betul apabila beliau menentukan bahawa beban perundangan terletak pada plaintif (lihat perenggan 20).

(2) Setelah membaca dengan teliti perjanjian dan khususnya, klausa-klausa 3.2 dan 3.3, tiada terma-terma termasuk yang mana di bawah penelitian adalah tidak jelas, atau mengelirukan, pasti tidak mewajarkan penglibatan dalam kaedah proferentem kontra. Pihak-pihak telah bersetuju bahawa bayaran adalah berdasarkan sistem bil sendiri. Sistem SBK ini bermaksud bayaran bergantung kepada pendokumentasian dalam bentuk PPR yang dihasilkan oleh defendan. Pihak-pihak telah memberikan diri mereka satu tempoh masa untuk bayaran dan untuk apa-apa pembetulan selanjutnya. Tempoh masa 30 hari yang dibenarkan

untuk pertikaian dan pembetulan yang mana jika disokong dengan dokumentasi, akan dilaksanakan akhirnya. Ini bermaksud bahawa jika tiada pertikaian dalam tempoh masa yang sama, maka bayaran adalah automatik dan dilakukan secara elektronik. Pentafsiran ini memberikan semua terma dan syarat perjanjian tujuan dan kesan, terutamanya apabila dibaca bersama. Jika tidak, klausa 3.2 tidak mempunyai tujuan atau kesan (lihat perenggan 21).

(3) Hakim Mahkamah Tinggi membuat penemuan spesifik berhubung kegagalan plaintif untuk mematuhi klausa 3.3 apabila ia tidak 'at the material time … subsequently send defendant an invoice accompanied by supporting documentation and information'. Kesemua penemuan spesifik tersebut berhubung fakta dinyatakan melalui keterangan dokumentar dan lisan di hadapan hakim perbicaraan dan mahkamah ini tidak dapat dan tidak mendapati apa-apa sebab untuk mengganggu kesimpulan sedemikian, Pembacaan dan pemakaian undang-undang kepada fakta di sini adalah dengan asas wajar dan ia adalah salah untuk campur tangan. Apabila beban bukti tidak dilepaskan, ia tidak sesuai atau wajar langsung untuk mengambil kira isu relief, termasuk membentuk suatu untuk disesuaikan dengan fakta dan keadaan tertentu (lihat perenggan 22 & 27).

(4) Pesanan belian membentuk kontrak berasingan yang mana pihak-pihak berhak membuat pada bila-bila masa, malah sepanjang pelaksanaan perjanjian. Walaupun tiada peruntukan untuk perkhidmatan sebegini dalam perjanjian tersebut, perkhidmatan itu telah dipersetujui melalui perjanjian berasingan. Ini adalah asas mencukupi untuk item tuntutan ini. Keputusan hakim Mahkamah Tinggi berhubung pembatalan jenama akhirnya disahkan (lihat perenggan 32).

(5) Berhubung sepuluh lori tempoh tambahan, tuntutan plaintif adalah untuk kos menyediakan sepuluh lori tambahan yang telahpun dalam sistem defendan sebagai 'spot trucks'. 'Term trucks' merujuk kepada lori yang khusus bermaksud hanya untuk kegunaan defendan dan telahpun tersedia untuk kegunaan defendan. Lori-lori tersebut tidak boleh digunakan untuk apa-apa tujuan lain kerana mereka telahpun membawa logo defendan. 'Spot trucks' adalah lori-lori yang diambil oleh plaintif daripada kumpulan lorinya untuk apa-apa kegunaan sementara syarikat. Tiada kesilapan yang boleh dirayukan telah dilakukan oleh hakim Mahkamah Tinggi yang bijaksana berhubung kepada tuntutan ini dan sewajarnya, penemuan ini tidak diganggu. Keputusan hakim Mahkamah Tinggi berhubung lori tempoh tambahan telah disahkan (lihat perenggan 38).

(6) Berdasarkan bahawa hakim Mahkamah Tinggi sebenarnya berpuas hati dengan bukti pelbagai kerugian yang dialami oleh defendan telah tidak membenarkan tuntutan hanya kerana tiada notis atau invois

dikemukakan, tuntutan plaintif untuk bayaran balik sepatutnya telah ditolak. Sememangnya terdapat keterangan yang memuaskan berhubung kerugian defendan tentang produk-produk petroleumnya yang disebebkan oleh plaintif dalam pelbagai kejadian yang telah berlaku (lihat perengga 55).]

Notes

For cases on agreement in general, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3255–3345.

Cases referred to

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd [2009] 6 MLJ 1, CA (refd)

Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd [2012] 4 MLJ 149, CA (refd)

RHB Bank (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188, FC (refd)

UEM Genisys Sdn Bhd & Ors v Genisys Integrated Engineers Pte Ltd [2010] MLJU 2179; [2010] 9 CLJ 785, FC (refd)

Appeal from: Civil Suit No 22NCvC-496–10 of 2014 (High Court, Kuala Lumpur)

K Kirubakaran (Raymond Mah, Noor Asnie bt M Salleh and John Chan with him) (Megat Najmuddin Leong & Co) for the appellant in Civil Appeal No W-02(NCVC)(W)-1237–08 of 2015.

Darryl Goon (M Rajasekaran and M Vinoben with him) (Raja, Darryl & Loh) for the appellant in Civil Appeal No W-02(NCVC)(W)-1208–07 of 2015.

Darryl Goon (M Rajasekaran and M Vinoben with him) (Raja, Darryl & Loh) for the respondant in Civil Appeal No W-02(NCVC)(W)-1237–08 of 2015.

K Kirubakaran (Raymond Mah, Noor Asnie bt M Salleh and John Chan with him) (Megat Najmuddin Leong & Co) for the respondant in Civil Appeal No W-02(NCVC)(W)-1208–07 of 2015.

Mary Lim JCA (delivering judgment of the court):

[1] These two appeals by both parties to the suit were heard together. That being so, it makes good sense to refer to the parties as they were in the High Court.

SOME FACTUAL BACKGROUND

[2] The background facts leading to this appeal before us are these. The plaintiff is a company in the business of, inter alia, providing transportation services. The defendant is a company in the business of, inter alia, operating oil refineries to process petroleum and petroleum products. The parties entered into a Standard Transportation Agreement No 2005–01FM dated 19 December 2005 ('the agreement'). Under the agreement, the plaintiff agreed to provide transportation services to deliver the defendant's bulk fuels and petroleum products from the defendant's four tributary zones or loading plants to various locations in Peninsula Malaysia upon the request of order of the defendant. These zones or plants were the Port Dickson Terminal ('PDT'), Pasir Gudang Terminal ('PGT'), Bagan Luar Terminal ('BLT') and Kuantan Terminal ('KT').

[3] The agreement consists of some 35 articles together with exhs A to F and their respective attachments. The agreement was amended several times as reflected in amendments Nos 1–19. The exhibits, attachments and the amendments all form part of the agreement and are to be read together. The agreement was originally for the period commencing 1 January 2006–30 June 2011. By virtue of amendment Nos 2 and 7, the term of the agreement was extended to 30 November 2013, after which the agreement expired by effluxion of time.

[4] On 30 March 2012, San Miguel Corp of the Philippines acquired substantial shares in the defendant, then known as 'Esso Malaysia Bhd'. From 1 April 2012, Esso Malaysia Bhd was known as 'Petron Malaysia Refining & Marketing Bhd'. Following this change, the plaintiff raised 13 invoices totaling RM41,091,723.50. Six of the invoices for the sum of RM26,745,277 were for purported shortfall in payment for services rendered in its listing of services through the self-billing system that the parties had implemented between themselves. The remaining seven invoices were for various works and tasks completed by the plaintiff which it claimed were upon the directions of the defendant. These seven invoices totaled a sum of RM14,346,446.50.

[5] All 13 invoices were disputed by the defendant. In its claim, the plaintiff sought first an order that the defendant rectify the listing of services and monthly SBS invoices amount including the months referred in the pertinent invoices; before claiming the total sum of RM41,091,723.50 together with interest thereon. In its amended defence, the defendant counterclaimed a sum of RM35,398,903.54 together with interest. That counterclaim was withdrawn after the plaintiff's four witnesses had testified and the plaintiff had closed its case. The counterclaim was accordingly struck out with costs. The defendant proceeded to call five witnesses.

[6] Upon due consideration, the learned High Court judge dismissed the plaintiff's prayer for rectification but allowed some of its claims totaling RM3,739,463 together with interest as follow:

(a) RM352,250.50 in respect of part of the first invoice on de-branding;

(b) RM2,516,692.50 in respect of part of the fourth invoice on additional term trucks; and

(c) RM870,520 in respect of 11th invoice on debit notes.

THE TWO APPEALS

[7] The defendant's appeal (Civil Appeal No W-(NCC)-02–1237–08 of 2015) is against the whole of this decision whereas the plaintiff's appeal (Civil Appeal No W-(NCC)-02–1238–08 of 2015) is in respect of those claims and invoices that were dismissed, that is:

(a) ninth, tenth, 12th and 13th invoices — SBS invoices;

(b) sixth and seventh invoices — SBS and SOCD invoices;

(c) second invoice for RM5.32m for Michelin X-One Tyres;

(d) first invoice for the full sum of RM2,209,091 for de-branding; and

(e) fourth invoice for the full sum of RM5,033,285 for ten additional term trucks.

[8] After hearing the parties, we unanimously dismissed the plaintiff's appeal and allowed the defendant's appeal in part subject to the defendant's undertaking to pay a sum of RM352,000 for de-branding costs. We agreed with the defendant that the learned High Court judge had erred in allowing the claim for RM870,520 in respect of 11th invoice on debit notes and we accordingly varied that part of the order of the High Court.

OUR DECISION

[9] We propose to deal with the appeals by addressing the various heads of claims or invoices generally in the manner that they were dealt with by the learned High Court judge. Three issues were posed for determination at the High Court. The first was whether the defendant was contractually obliged to rectify the listing of services which were alleged to be erroneous and thereby rectify the monthly self-billing invoices raised by the defendant. The second issue was whether the defendant was in breach for not rectifying, while the third issue was the matter of whether the plaintiff was entitled to its claim.

[10] As will become evident the appeals are substantially against findings of fact by the learned judge. The appellate courts are most reluctant to intervene in such instances unless there are patent errors or where such findings are plainly erroneous and not supported by the evidence before the trial court. See the Federal Court's decision in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 and the Court of Appeal's decision *Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd* [2009] 6 MLJ 1. We find the instant appeals to be of such nature and character, save in respect of the appeal on the award relating to debit notes.

The SBS invoices and SOCD invoices

[11] In effect, the first two issues dealt with six invoices concerning SBS and SOCD for the total amount of RM26,745,277. 'SBS' stands for 'self billing system' whereas 'SOCD' refers to 'station operator controlled delivery' as opposed to 'DCD' which is 'driver controlled delivery'.

[12] The agreement provided for what is known as a 'self billing' system or SBS. Clause 1.0 of exh B — calculation of payment for services states that 'self billing' — means a system by which company provides the documentation enabling either the company or the contractor to issue the monthly invoice. Under cl 3.2, the parties agreed that:

> At the beginning of each month, Company will send out a listing of Services performed by the Contractor on behalf of the Company during the previous month. On the basis of this listing, Company will pay Contractor electronically the total freight amount to be paid by Company for all Services performed by the Contractor performed in the previous month.

[13] As for the services that were agreed to be performed, cl 2.0, inter alia, provided for the rates of payment:

> 2.0 TRANSPORTATION RATES AND PAYMENT
>
> 2.1 Transportation Rates will be shown in Attachment 1 to this Exhibit B.
>
> 2.2 For Term (MEU and Existing) Fleet the transportation rates will consist of three elements:
>
> (a) A fixed monthly fee;
>
> (b) A fixed price per load;
>
> (c) A fixed fee per KM. The KM used being the shortest distance from the loading point to the customer(s) and return on authorised roads. The distance will be calculated by Company.
>
> 2.3 For Spot (Repetitive and Ad-hoc) Fleet, the Transportation rates consist of two elements:

(a) A fixed price per load;

(b) A fixed fee per KM. The KM used being the shortest distance from the loading point to the customer(s) and return on authorised roads. The distance will be calculated by Company.

[14] In the matter of corrections, the parties agreed under cl 3.3 that:

> For eventual corrections to the self billing and for exceptional additional charges (if agreed in this exh B), Contractor will obtain agreement with Company and subsequently send Company an invoice accompanied by supporting documentation and information as required by Company.

[15] The plaintiff's primary claim concerned the defendant's obligation to make 'eventual corrections' under cl 3.3 of exh B to the agreement. The plaintiff submitted six invoices containing its eventual corrections to the value of RM26,745,277 on account of alleged short changes by the defendant.

[16] The plaintiff maintained that it was entitled to the declaratory order and a finding that the defendant was in breach of the SBS obligations under the agreement because the self-billing system meant that the defendant was responsible for ensuring that the listing of services that it issued to the plaintiff was correct. In the event of errors, the plaintiff has a right to eventual corrections by the defendant. For the purpose of payment under the SBS, the defendant would issue monthly 'payment proposal reports or PPR' to the plaintiff. These PPRs detailed the transportation services rendered by the plaintiff to the defendant in the previous month. The defendant pays the plaintiff against these PPRs 30 days after the end of each month. If there was any error, the plaintiff was to inform the defendant of such error. The defendant would then make eventual corrections based on supporting documents provided by the plaintiff. Upon the expiry of the agreement, the plaintiff claimed that the defendant had short changed the plaintiff and it sought rectifications by the defendant. The defendant refused.

[17] The learned High Court judge disagreed with the plaintiff on these claims. Her Ladyship found that the plaintiff had not discharged the burden of proving that there were errors in the self-billings which required eventual corrections by the defendant. Specifically, Her Ladyship found that the plaintiff itself had not complied with the requirements of the agreement nor did it apply the correct rates. Consequently, the defendant was not obliged to rectify.

[18] Before us, the plaintiff submitted that the legal burden of proving that the self-billing system was correct was with the defendant given that the system was 'solely within the management and control' of the defendant and given the

defendant's continuing obligation to correct any errors under cl 3.3. All relevant documentation was also produced by the defendant with the defendant retaining a copy of each PPR that it sent to the plaintiff. Although cl 3.3 imposes a requirement that the plaintiff first seeks the agreement of the defendant for eventual corrections to the self-billing system; and thereafter send an invoice together with supporting documentation and information, these requirements were not necessary for the same reasons. The defendant was obliged to correct the errors in its self-billing system upon being made aware of and/or receiving the first to the sixth invoice from the plaintiff. Learned counsel contended that the learned High Court judge's interpretation was both unreasonable and unfair as cl 3.3 and the agreement were ambiguous. The principle of contra proferentum ought to have been applied in the plaintiff's favour.

[19] With respect, we disagree. We find the learned High Court judge's reading and construction of cll 3.2 and 3.3 of the agreement to be correct in law. We further find Her Ladyship's application of the law to the facts correct.

[20] The burden of proof lies with the plaintiff, not just in relation to the claim but in its assertion that there are errors in the self-billing system. It would appear from the payment mechanism in the agreement itself that the parties had provided that the SBS was assumed or treated as correct until and unless it is challenged within a 30 day time frame. Where there is proper documentation and information to support that challenge, the defendant is obliged to make corrections. The obligation is on the plaintiff to make the challenge within that agreed time frame. Where it makes the challenge, it must provide proof of erroneous listing of services. That makes sense as until and unless there are alerts to errors, the matter of payment is left entirely to the SBS itself. That was how the parties have chosen to regulate their affairs and the court has repeatedly opined that it will give effect to the contract as it is not the court's function to rewrite any of its terms or conditions. The learned High Court judge was therefore correct when she determined that the legal burden was with the plaintiff.

[21] Upon a careful reading of the agreement and in particular, cll 3.2 and 3.3, we further do not find any of its terms including the ones under scrutiny to be unclear or ambiguous, certainly not as to warrant the engagement of the contra proferentum rule. The parties had agreed that payment was based upon a self-billing system. This SBS system meant payment relied on documentation in the form of PPRs generated by the defendant. The parties had given themselves a time frame for payment and for any eventual corrections. That time frame of 30 days allowed for disputes and corrections which if supported by documentation, would eventually be carried out. That must mean that if there are no disputes within that same time frame, then payment is, as quite

rightly concluded by the learned High Court judge, automatic and electronically done. This interpretation and construction is not only reasonable and fair but is proper, as it reflects the clear intention of the parties. This interpretation gives all the terms and conditions of the agreement purpose and effect, especially when read together. Otherwise, cl 3.2 will serve no purpose and have no effect.

[22] The learned High Court judge had also made specific findings of the plaintiff's failure to comply with cl 3.3 when it did not 'at the material time ... subsequently send defendant an invoice accompanied by supporting documentation and information'. Because of the plaintiff's own failure to claim reliance on cl 3.3 by sending to the defendant the necessary 'supporting documentation and information', the learned High Court judge was entitled to reach the conclusion which Her Ladyship did, and that is, under such conditions, there was no contractual obligation on the defendant to rectify the listing of services.

[23] Her Ladyship construed cll 3.2 and 3.3 of the agreement to mean:

> ... it is for the plaintiff to make objections if the plaintiff disputes the contents of the self-billing. Otherwise, in accordance with cl 3.2, the defendant automatically, by electronic means, pay the plaintiff through the self billing.

[24] Her Ladyship found that the plaintiff neither obtained the agreement of the defendant to make eventual corrections to the PPRs nor produced supporting documents to the defendant to make such corrections. Although PW1 had testified that the defendant had 'short changed the plaintiff through the self billing', the High Court found that 'what is crucial is that at the material time, the plaintiff did not 'subsequently send defendant an invoice accompanied by supporting documentations and information' in accordance with cl 3.3'. As a result of this failure on the part of the plaintiff, Her Ladyship held:

> Therefore, there is no contractual obligation on the part of the defendant to rectify the listing of service as prayed for in the SOC when clearly the plaintiff did not do its part to comply with the requirements of cll 3.2 and 3.3 of exh B of the agreement.

[25] In any case, the rates applied by the plaintiff in the six SBS invoices were found to be wrong. The plaintiff's claim on these six invoices was based on a rate that had been amended, revised and was no longer applicable. The learned High Court judge agreed with the defendant that the applicable rates ought to have been the rates amended vide amendment No 7 dated 22 December 2008, as admitted by the plaintiff's own witness, PW1. Because the six SBS invoices

were for the years 2011–2013, there were no other rates except for those specified in amendment No 7 and these rates applied till the expiration of the agreement.

[26] In addition to the above, the learned High Court judge found that in relation to two of the invoices, there were additional charges for SOCD. Since the plaintiff's own witness had also admitted that there was no such term as SOCD in the agreement, that it was entirely created by PW1, with no other evidence adduced as to how it was computed and derived, Her Ladyship simply did not find the burden of proof discharged. The trial court further declined to accept the plaintiff's submission that the court should allow the claim as the court retained discretion to mould the relief in the interest of justice finding that the burden of proof had not been discharged.

[27] We agree. All these specific findings of fact are borne out by the documentary and oral evidence before the trial judge and this court cannot and does not find any reason to disturb such conclusions. The reading and application of the law to the facts here was with proper basis and it would be erroneous on our part to intervene. When the burden of proof is not discharged, it is neither appropriate nor proper to consider even the issue of relief, including moulding one to suit the peculiar facts and circumstances. We therefore find that the trial court was right in its decision in relation to the first two issues and consequently dismissing the plaintiff's claim for the sum of RM26,745,277.

[28] The decision of the learned High Court judge on these invoices is therefore affirmed.

De-branding

[29] Moving next to the remaining claims for the total sum of RM14,346,446.50 made through seven invoices, we shall deal first with the claim for de-branding which is found in the first invoice. The court had allowed the sum of RM352,250.50 while the plaintiff's claim was for the sum of RM2,209,091. The parties had both appealed on this award.

[30] As explained by the trial judge, de-branding is the removal of ExxonMobil markings on the plaintiff's trucks. This was consequent to the change of ownership of the defendant when San Miguel Corp acquired the defendant with effect from 1 April 2012. As part of that acquisition, the defendant was required to change all markings to the defendant's markings. The plaintiff was requested by the defendant to do this 'without ghosting', that is, without remnant imprints of the former brand. Although these services were

not listed in the agreement, the High Court found that there were specific requests for such works as evidenced by the purchase order issued by the defendant.

[31] As to the value of these services, the High Court found that the plaintiff was however, not entitled to the sum claimed but to the sum of RM352,250 since that was the negotiated amount. The High Court also examined the trail of emails exchanged between the parties at the material time in support of this conclusion.

[32] Having considered the submissions of both counsel and the reasons of the learned High Court judge as set out above, we must say that we agree with the views and decision of the learned High Court judge in this respect. We agree with the learned High Court judge that the purchase order formed a separate contract which the parties are entitled to make at any time, even during the course of the agreement. Although there were no provisions for such services in the agreement, the services were agreed through a separate agreement. This is sufficient basis for this item of claim. The decision of the learned High Court judge on the de-branding is consequently affirmed.

[33] Learned counsel for the defendant has further agreed with the court that there must be payment for such services and has undertaken to advise the defendant to pay on this sum.

X-1 Michelin Tyres

[34] The three remaining items are the awards on the X-1 Michelin Tyres, the ten additional term trucks and, on the defendant's debit notes.

[35] First, the X-1 Michelin Tyres. This claim for the sum of RM5.32m was disallowed by the High Court.

[36] The agreement required the plaintiff to use Michelin X-1 tyres for MEU or 'most efficient unit' trucks. The specifications for such tyres are to be found in attachment 2 A to exh A of the agreement. The plaintiff did not use X-1 Michelin Tyres tyres because they were not available in the market from 1 January 2006–5 March 2013. Because the agreement prohibited the plaintiff from using Michelin rethreaded tyres, the plaintiff used new X-1 Michelin Tyres. The plaintiff's claim here was for the price difference between the new X-1 Michelin Tyres and Michelin rethreads. This claim was disallowed for the following principal reasons:

(a) the scheduled rates had already factored in the type of tyres to be used with no express provision for reimbursements for use of new X-1 Michelin tyres;

(b) none of the amendments to the agreement made provisions for this claim of reimbursements;

(c) although the defendant gave some leeway or option to use rethreaded tyres, there was still no express provision for the plaintiff to use Michelin rethreads with the plaintiff especially where the plaintiff itself failed to respond to the defendant's invitation to discuss the matter further; and

(d) the agreement could not have catered for the use of Michelin rethreads because at the material time of the agreement in 2006, there were restrictions imposed by the government here and in Thailand on the import of Michelin rethreads into Malaysia.

[37] These findings and conclusions are well borne out by the oral and documentary evidence led by both parties. Again, there is no basis for this court to interfere. The decision of the learned High Court judge on the X-1 Michelin tyres is also affirmed.

Ten additional term trucks

[38] As for the ten additional term trucks, the plaintiff's claim was for the costs of making available ten additional trucks which were already in the defendant's system as 'spot trucks'. 'Term trucks' referred to dedicated trucks meant only for the defendant's use and are already at the defendant's disposal. These trucks cannot be used for any other purpose as they already carry the defendant's logo. 'Spot trucks' are trucks taken by the plaintiff from its pool of trucks for any of the company's temporary use.

[39] The agreement made provision for the use of 'term trucks' where there were fixed monthly charges; and 'spot trucks'. Once the spot trucks are converted into term trucks, the defendant would be charged a fixed monthly charge for these trucks. This can be seen in cl 3.2.

[40] The dispute here concerned the number of spot trucks which were provided and converted into term trucks. The defendant claimed that the plaintiff only provided three out of the ten additional term trucks requested by them. The balance seven trucks were never provided. The plaintiff on the other hand, claimed that all ten trucks were provided.

[41] The learned High Court judge was satisfied from both the oral evidence of both DW1 and DW2, and the documentary evidence in the form of the

emails exchanged between the parties at the relevant time, that first of all, there was a request put in by the defendant for ten additional term trucks to be provided by the plaintiff. However, the evidence showed that only eight of the plaintiff's spot trucks were already in the defendant's system and these nine trucks were part of the ten additional trucks requested. The High Court therefore found the defendant liable to pay for these eight trucks as additional term trucks. Since the defendant had already paid for three of these additional term trucks, the defendant was therefore required to pay for the remaining five additional term trucks at the sum of RM2,516,692.50.

[42] Having examined the relevant records, we can see no appealable errors committed by the learned High Court judge on this head of claim and accordingly, we shall not disturb this finding. The decision of the learned High Court judge on the additional term trucks is also affirmed.

Debit notes

[43] Lastly, on the defendant's deduction for 40 debit notes for the total sum of RM870,520. The defendant claimed that it had a right under article 15.1(b)(iii) of the agreement to debit the plaintiff for payments for losses sustained by the defendant as a result of loss, damage or destruction of products, whether due to leakage, fire, theft, damage, product crossovers and spillages, contamination, collision with any object, or from any causes whatsoever caused by the plaintiff. In essence, the claim was for the loss of the defendant's petroleum products through spillage, pilferage, mix of petrol with diesel, known as 'crossover'; all of which are said to be caused by the plaintiff's servants or agents.

[44] The plaintiff's claim was that the defendant had wrongly debited the plaintiff. The plaintiff's contention was that the defendant failed to comply with the requirements of article 15.1(b)(iii) of the agreement and that there was no evidence of the market value of the products concerned.

[45] The learned High Court judge agreed with the plaintiff. Although the High Court was prepared to take judicial notice of pump price as stipulated by the government to be the market value of the products which represent the defendant's losses, the High Court was not prepared to allow the defendant's deductions for the 40 debit notes as the defendant had not invoiced the plaintiff for such amounts. The court found that it was only after the plaintiff had failed to settle within 30 days, the sums invoiced by the defendant, that the defendant was then entitled to deduct from monies due to the plaintiff. Since there was no evidence of such invoices from the defendant, the deductions for the debit notes were wrong and the defendant was ordered to refund the plaintiff the sum deducted.

[46] The plaintiff's claim was allowed on the basis that article 15.1(b)(iii) of the agreement was not met; that the 40 debit notes were issued without notice or invoice to the plaintiff.

[47] Before us, learned counsel for the defendant submitted that this complaint of non-compliance with article 15.1(b)(iii) of the agreement was never part of the plaintiff's pleaded case. The plaintiff's reply to defence and defence to counterclaim, in particular para 7.16 was referred to:

> 7.16 In respect of paragraph 12.11 of the Statement of Defence save that the various debit notes were issued by the defendant against the plaintiff the rest of the allegations contained therein are denied, the plaintiff avers that the defendant had wrongly issued various debit notes against the plaintiff without proper supporting verifiable documentation. Furthermore and in any event, the defendant is put to strict proof to provide proof of payment in respect of all the debit notes before the demand can be made against the plaintiff if at all proven by the defendant, the plaintiff demanded that whatsoever amount which is deducted to be credited and refunded to the plaintiff.

[48] This complaint was raised for the first time at the cross-examination of DW2. DW2 testified that there were no invoices raised on the debit notes.

[49] Having carefully examined the pleadings and having considered the decision of the learned High Court judge, we find ourselves compelled to agree with the defendant in this regard. On this, we find that we cannot agree with the learned High Court judge.

[50] The plaintiff's pleading on this matter of the debit notes does not, and neither do any of the other pleas in the reply to the defence and the defence to counterclaim, raise the aspect or ground that the learned High Court judge finally relied on to dismiss the defendant's claim on the debit notes. With the parties bound by their respective pleaded case, we are unable to agree with the learned High Court judge on this part of her decision. The law is trite in this regard; we need only cite high authority in the decision of the Federal Court in *RHB Bank (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188. Since it was never part of the plaintiff's pleaded case that there is this want of notice or invoice, the defendant never led evidence or proper evidence on the point.

[51] For this reason alone, this court is bound to intervene. There is a misapprehension of and misdirection on the law and the facts in this respect which warrants the exercise of appellate intervention — see *UEM Genisys Sdn Bhd & Ors v Genisys Integrated Engineers Pte Ltd* [2010] MLJU 2179; [2010] 9 CLJ 785 and *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149. The Federal Court had observed in *UEM Genisys Sdn Bhd & Ors*

at p 800 that:

> It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence.

[52] Unlike the earlier matters which involve substantially if not all, findings of fact by the trial court, and where the appellate court will be extremely slow to disturb nor is it desirable to do so, on this matter of the debit notes, the situation is quite different. It is a matter of plea and not of the evaluation of witnesses whilst testifying, or a matter of documentary evidence. This was not addressed by Her Ladyship; if it had, we are confident that the court would have disallowed this part of the plaintiff's claim.

[53] According to the defendant, had the complaint been lodged in the pleaded case, the defendant would have countered with contentions of estoppel, acquiescence or waiver. There was actually an explanation for the lack of notice as it was actually the accepted practice between the parties; and it explained for why the plaintiff never objected to the procedure adopted at the material time. This was evident from the evidence of DW2 in cross-examination where he explained that it 'has been the standard practice from day one that debit note was sent directly'.

[54] On the matter of value of the defendant's losses, this is what the relevant parts of article 15.1 of the agreement state:

> 15.1 Contractor's Responsibilities
>
> (a) ...
>
> (b) Responsibility for product:
>
> (i) contractor shall be responsible for the product once delivered into the vehicle of the contractor and shall be liable to company for any loss, damage or destruction of products, whether due to leakage, fire, theft, damage, contamination, collision with any object o or from any cause whatsoever ...
>
> (ii) contractor shall be responsible for any difference between the quantity of products loaded and the quantity of products recorded at the delivery point, with any shortage for contractor's account ...
>
> (iii) all claims will be settled based on market value of the products at the delivery point on the date lost, damages or contaminated. The value of such products will be invoiced to contractors and if not settled within thirty days, the sum will be deducted from monies due to the contractor hereunder.

[55] Given that the learned High Court judge was actually satisfied with proof of the various losses sustained by the defendant but disallowed the claim only for want of notice or invoice, we find that the plaintiff's claim for a refund here ought to have been dismissed. There was indeed satisfactory evidence of the defendant's losses to its petroleum products caused by the plaintiff in the various incidents that had taken place. It was proper for the learned High Court judge to take judicial notice of the fact that the pump price of petroleum products are stipulated by the government. With there being no challenge or serious challenge on the defendant's losses, the defendant was entitled to deduct the total sum of RM870,520.

[56] The decision of the learned High Court judge on the debit notes is accordingly set aside.

CONCLUSION

[57] For all the reasons set out above and on the defendant's undertaking to pay for the de-branding costs at the negotiated sum of RM352,000, we unanimously dismiss the plaintiff's appeal in Civil Appeal No W-02-(NCVC)(W)-1237–08 of 2015 and allow in part, the defendant's appeal in Civil Appeal No W-02(NCVC)(W)-1208–07 of 2015 with costs of RM30,000 here and below to the defendant in respect of both appeals.

Dismissed plaintiff's appeal and allowed defendant's appeal in part.

Reported by Afiq Mohamad